

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CLAUDINE K. TURLEY

Claimant

VS.

YUASA EXIDE CORPORATION

Respondent

AND

**AMERICAN NATIONAL FIRE INSURANCE
COMPANY**

Insurance Carrier

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Docket No. 219,643

ORDER

Respondent appeals from the September 20, 1999, Award of Administrative Law Judge Bruce E. Moore. The Judge granted claimant an 8 percent functional disability, increased to an 88.5 percent work disability through March 11, 1999, and, thereafter, decreased the award to a 75 percent permanent partial general disability after a post-injury wage was imputed. Oral argument was held on January 18, 2000.

APPEARANCES

Claimant appeared by her attorney, Derek R. Chappell of Ottawa, Kansas. Respondent and its insurance carrier appeared by their attorney, Melvin J. Sauer, Jr., of Hays, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for the purposes of this award.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, including the briefs of the parties, and after oral argument, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed.

The Appeals Board finds that the Award sets out findings of fact and conclusions of law that are both accurate and supported by the record. The Appeals Board, therefore, adopts the findings of fact and the conclusions of law of the Administrative Law Judge as if specifically set forth herein.

The record is uncontradicted in that claimant suffered accidental injury to her sixth thoracic vertebra on October 29, 1996, while attempting to free a tray of batteries. The claimant suffered an 8 percent functional impairment to the body as a whole as a result of that injury.

The primary dispute in this matter stems from respondent's contention that claimant was offered an accommodated position and should, therefore, be denied any work disability pursuant to Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), and Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* ___ Kan. ___ (1998), wherein the courts determined that an employee, who was capable of accommodated work, must, at a minimum, attempt to perform such work, if offered, or be denied a work disability.

In this instance, respondent offered claimant an accommodated position, but claimant refused the offer. The offered position was the same job at which claimant suffered her initial injury. Claimant had earlier, after the accident, returned to this job, but was unable to perform same due to the level of pain involved. The Appeals Board finds claimant did not violate either Foulk or Lowmaster in refusing to return to this job, as she had earlier attempted to return to this job on two separate occasions and was unable to perform the job. Therefore, claimant is entitled to a work disability under K.S.A. 1996 Supp. 44-510e. See Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

The Appeals Board finds the task loss opinion of Edward J. Prostic, M.D., to be the most credible, as it is based more upon claimant's actual abilities, rather than the speculation and conjecture of C. Reiff Brown, M.D., as to what claimant might be able to perform. The Administrative Law Judge, at an earlier hearing, strongly suggested that either a videotape or a detailed job description be provided to Dr. Brown regarding what, if any, job tasks claimant had lost the ability to perform. However, the document describing claimant's general duties, which was ultimately provided to Dr. Brown, provided little or no detail as to the physical requirements of the job. The Appeals Board concludes that Dr. Prostic better understood the requirements of claimant's former tasks and adopts the opinion of Dr. Prostic, finding that claimant has suffered a 77 percent task loss as a result of her injuries suffered on October 29, 1996.

The Administrative Law Judge found no evidence regarding claimant's attempt to find employment after March 11, 1999. As of that date, the Administrative Law Judge imputed a wage to claimant based upon Monty Longacre's opinion that claimant was capable of earning \$120 per week, representing \$6 an hour times four hours per day times five days per week. Claimant had been limited in her return to work to four hours per day. The Board agrees. See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The Appeals Board finds claimant entitled to an 88.5 percent work disability, based upon a 77 percent task loss and a 100 percent wage loss, through March 11, 1999. After March 11, 1999, the \$120 per week wage is imputed to claimant, reducing the wage loss from 100 percent to 73 percent. This, when averaged with claimant's 77 percent task loss, yields a work disability of 75 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated September 20, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Derek R. Chappell, Ottawa, KS
 Melvin J. Sauer, Jr., Hays, KS
 Bruce E. Moore, Administrative Law Judge
 Philip S. Harness, Director